

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 20, 2011

TO: Persons on the attached mailing list.

RE: Aspen Power LLC  
TPDES Permit No. WQ0004921000

### **Decision of the Executive Director.**

The executive director has made a decision that the above-referenced permit application meets the requirements of applicable law. **This decision does not authorize construction or operation of any proposed facilities.** Unless a timely request for contested case hearing or reconsideration is received (see below), the TCEQ executive director will act on the application and issue the permit.

Enclosed with this letter is a copy of the Executive Director's Response to Comments. A copy of the complete application, draft permit and related documents, including public comments, is available for review at the TCEQ Central office. A copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at Lufkin City Hall, 300 East Shepherd Avenue, Lufkin, Texas.

If you disagree with the executive director's decision, and you believe you are an "affected person" as defined below, you may request a contested case hearing. In addition, anyone may request reconsideration of the executive director's decision. A brief description of the procedures for these two requests follows.

### **How To Request a Contested Case Hearing.**

It is important that your request include all the information that supports your right to a contested case hearing. You must demonstrate that you meet the applicable legal requirements to have your hearing request granted. The commission's consideration of your request will be based on the information you provide.

The request must include the following:

- (1) Your name, address, daytime telephone number, and, if possible, a fax number.
- (2) If the request is made by a group or association, the request must identify:
  - (A) one person by name, address, daytime telephone number, and, if possible, the fax number, of the person who will be responsible for receiving all communications and documents for the group; and

- (B) one or more members of the group that would otherwise have standing to request a hearing in their own right. The interests the group seeks to protect must relate to the organization's purpose. Neither the claim asserted nor the relief requested must require the participation of the individual members in the case.
- (3) The name of the applicant, the permit number and other numbers listed above so that your request may be processed properly.
- (4) A statement clearly expressing that you are requesting a contested case hearing. For example, the following statement would be sufficient: "I request a contested case hearing."

Your request must demonstrate that you are an **"affected person."** An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Your request must describe how and why you would be adversely affected by the proposed facility or activity in a manner not common to the general public. For example, to the extent your request is based on these concerns, you should describe the likely impact on your health, safety, or uses of your property which may be adversely affected by the proposed facility or activities. To demonstrate that you have a personal justiciable interest, you must state, as specifically as you are able, your location and the distance between your location and the proposed facility or activities.

Your request must raise disputed issues of fact that are relevant and material to the commission's decision on this application. The request must be based on issues that were raised during the comment period. The request cannot be based solely on issues raised in comments that have been withdrawn. The enclosed Response to Comments will allow you to determine the issues that were raised during the comment period and whether all comments raising an issue have been withdrawn. The public comments filed for this application are available for review and copying at the Chief Clerk's office at the address below.

To facilitate the commission's determination of the number and scope of issues to be referred to hearing, you should: 1) specify any of the executive director's responses to comments that you dispute; and 2) the factual basis of the dispute. In addition, you should list, to the extent possible, any disputed issues of law or policy.

### **How To Request Reconsideration of the Executive Director's Decision.**

Unlike a request for a contested case hearing, anyone may request reconsideration of the executive director's decision. A request for reconsideration should contain your name, address, daytime phone number, and, if possible, your fax number. The request must state that you are requesting reconsideration of the executive director's decision, and must explain why you believe the decision should be reconsidered.

## **Deadline for Submitting Requests.**

A request for a contested case hearing or reconsideration of the executive director's decision must be **received** by the Chief Clerk's office no later than **30 calendar days** after the date of this letter. You may submit your request electronically at <http://www.tceq.state.tx.us/about/comments.html> or by mail to the following address:

LaDonna Castañuela, Chief Clerk  
TCEQ, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

## **Processing of Requests.**

Timely requests for a contested case hearing or for reconsideration of the executive director's decision will be referred to the alternative dispute resolution director and set on the agenda of one of the commission's regularly scheduled meetings. Additional instructions explaining these procedures will be sent to the attached mailing list when this meeting has been scheduled.

## **How to Obtain Additional Information.**

If you have any questions or need additional information about the procedures described in this letter, please call the Office of Public Assistance, Toll Free, at 1-800-687-4040.

Sincerely,



LaDonna Castañuela  
Chief Clerk

LDC/er

Enclosure

MAILING LIST  
for  
Aspen Power LLC  
TPDES Permit No. WQ0004921000

FOR THE APPLICANT:

Mark Knippa  
Aspen Power LLC  
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Houston, Texas 77057

Danny M. Vines  
Aspen Power LLC  
P.O. Box 151507  
Lufkin, Texas 75915

PROTESTANTS/INTERESTED  
PERSONS:

Timothy J. Karczewski, Attorney  
Suzbrekensal Investments, Ltd. and its  
General Partner, Kenneth Rogers  
c/o Zeleskey Law Firm PLLC  
P.O. Drawer 1728  
Lufkin, Texas 75902-1728

FOR THE EXECUTIVE DIRECTOR  
via electronic mail:

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FOR OFFICE OF PUBLIC ASSISTANCE  
via electronic mail:

Bridget Bohac, Director  
Texas Commission on Environmental  
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FOR PUBLIC INTEREST COUNSEL  
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Texas Commission on Environmental  
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FOR THE CHIEF CLERK  
via electronic mail:

LaDonna Castañuela  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

TCEQ PERMIT NO. WQ0004921000

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

APPLICATION BY  
ASPEN POWER LLC  
FOR TPDES PERMIT NO.  
WQ0004921000

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§

BEFORE THE PM 4:17  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
OFFICE

**EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT**

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Public Comment (Response) on the application by Aspen Power, LLC (Applicant), for a new Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0004921000 and on the ED's preliminary decision. As required by 30 Texas Administrative Code (TAC) Section 55.156, before an application is approved, the ED prepares a response to all timely, relevant and material, or significant comments. The Office of the Chief Clerk timely received comment letters from Suzbrekensal Investments, Ltd. and its General Partner, Mr. Kenneth Rogers, ("SI Ltd") represented by Timothy J. Karczewski. This response addresses all such timely public comments received, whether or not withdrawn. If you need more information about this permit application or the wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. General information about the TCEQ can be found at our website at [www.tceq.state.gov](http://www.tceq.state.gov).

**I. BACKGROUND**

**A. Description of Facility**

The Applicant proposes to operate the Aspen Power Lufkin Generating Plant, a biomass-fired steam electric power generation facility. The facility will generate wastewater from cooling tower blowdown, boiler blowdown, de-ionization regeneration water, filtration backwash, reverse osmosis (RO) regeneration wastewater, domestic raw water, and storm water. Treated water for domestic use will be purchased from the City of Lufkin and raw water for process use will be produced from a deep well owned by

Aspen Power identified as Texas Water Development Board Well #3743102. Boiler and cooling tower feed water will be produced from a deep well. The applicant proposes to discharge cooling tower blowdown and low volume wastewater via Outfall 001. The cooling tower water will cool steam through a non-contact process steam condensate and will return it to the boiler in a closed loop. Domestic wastewater will be discharged to the City of Lufkin publicly owned treatment works (POTW). Storm water will be discharged under the authority of the TPDES Multi-sector Industrial General Permit for Storm water (TXR050000).

The Applicant has applied for a new permit to authorize the discharge of cooling tower blowdown commingled with low volume wastewater at a daily average flow not to exceed 214,560 gallons per day.

The proposed TPDES Permit No. WQ0004921000 will authorize the discharge of cooling tower blowdown and previously monitored effluent (low volume waste on a flow variable basis via Outfall 101) at a daily average flow not to exceed 214,560 gallons per day via Outfall 001.

The effluent is discharged to an unnamed tributary; thence to Ellen Trout Lake; thence to Mill Creek; thence to Paper Mill Creek; thence to Angelina River/Sam Rayburn Reservoir, in Segment No. 0615 of the Neches River Basin. The unclassified receiving waters have no significant aquatic life use for the unnamed tributary and high aquatic life use for Ellen Trout Lake. The designated uses for Segment No. 0615 are contact recreation, intermediate aquatic life use and public water supply. The effluent limits in the draft permit will maintain and protect the existing instream uses. All determinations are preliminary and subject to additional review and revisions.

The plant site is located approximately 0.5 mile east of the intersection of State Highway 103 and Kurth Drive in the City of Lufkin, Angelina County County, Texas.

## **B. Procedural Background**

The application was submitted on March 5, 2010, and declared administratively complete on April 20, 2010. The Notice of Receipt of Application and Intent to Obtain Permit was published in English and Spanish on May 5, 2010 in the *Lufkin Daily News*

and in *La Lengua Spanish Newspaper*, Angelina County, Texas. The ED completed the technical review of the application on August 9, 2010, and prepared a draft permit. The Notice of Application and Preliminary Decision was published on October 31, 2010 in the *Lufkin Daily News*, and on November 3, 2010 in the *La Lengua Spanish Newspaper* in Angelina County. The comment period for this application closed on December 3, 2010. This application was administratively complete on or after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801, 76<sup>th</sup> Legislature, 1999.

## II. COMMENTS AND RESPONSES

### **Comment 1:**

Mr. Karczewski stated that the route of the proposed discharge passes through a five-acre tract of land owned by SI Ltd immediately downstream from the Aspen Power Plant. In addition, the discharge route is not a natural waterway but rather a man-made course that has occurred only because of the railroad embankment and trestle along the west boundary of the SI Ltd tract. Because of the location of its property in relation to the Aspen Power tract and its proposed discharge, SI Ltd is an affected party as that term is defined by TCEQ Rules.

### **Response 1:**

Under 30 TAC § 55.211, the Commission will decide whether to grant a hearing request unless the matter is directly referred to the State Office of Administrative Hearings. Request for contested case hearings are reviewed under 30 TAC §§ 55.201, 55.203, 55.205, and 55.209. The Commission will consider all relevant factors in the evaluation of whether a request for hearing should be granted, including whether the requestor is an affected person with a "personal justiciable interest related to a legal right, duty, privilege, power, or economic interest" that would be affected by the application. In deciding whether a hearing requestor is an affected person, the Commission will consider whether the interest claimed is one protected by the law

under which the application will be considered; distance restrictions or other limitations imposed by law on the affected interest; whether a reasonable relationship exists between the interest claimed and the activity regulated; likely impact of the regulated activity on the health, safety, and use of property of the person; and other applicable conditions. The Commission will make this decision after the RTC and the Executive Director's decision is mailed to everyone who provided comment requested a contest case hearing no later than the 30th day of mailing of the RTC and final decision, and to anyone on the chief clerk's mailing list for this application.

In the wastewater permitting process, TCEQ is tasked by the Legislature with protecting the quality of the water in the state. Property value is not a factor in determining whether an applicant has met all of the statutory and regulatory criteria applicable to a wastewater permit.

The draft permit does not limit the ability of nearby landowners to use common law remedies for trespass, nuisance, or other causes of action in response to activities that may or do result in injury or adverse effects on human health or welfare, animal life, vegetation, or property, or that may or actually do interfere with the normal use and enjoyment of animal life, vegetation, or property.

**Comment 2:**

Mr. Karczewski commented that Aspen Power has no legal right to use the water course through the SI Ltd tract for its discharge. Therefore, any such use would constitute a trespass on the part of Aspen Power. For this reason, the TCEQ cannot and should not authorize a permit that is premised upon using the water course as method for the discharging of Aspen Power's effluent. The commenter argues that the TCEQ will invariably argue that the issuance of the permit would not give Aspen Power the right to use private property. The commenter stated that until the matter of the planned trespass is resolved, the issuance of a permit – the sole basis of which is authorizing a discharge through private property - would be an irresponsible governmental act, if not actionable on a constitutional basis as a taking.

**Response 2:**

The issuance of this permit does not grant to the permittee the right to use private or public property for conveyance of wastewater along the discharge route described in this permit. This includes, but is not limited to, property belonging to any individual, partnership, corporation or other entity. Neither does this permit authorize any invasion of personal right nor any violation of federal, state, or local laws or regulations. It is the responsibility of the permittee to acquire property rights as may be necessary to use the discharge route.

**Comment 3:**

Mr. Karczewski commented that the water to be discharged is cooling tower blowdown water. As such it will have a higher temperature than the water naturally occurring in the area. This increased temperature will result in the formation of additional bacteria and other pathogens that will serve as a human health risk to persons wishing to utilize the SI Ltd tract. This will also serve as a risk to aquatic life within the receiving waters and adjacent thereto.

**Response 3:**

The proposed permit does not authorize the Applicant to discharge domestic wastewater, which may be a source of bacteria and other pathogens. The daily maximum limit for temperature effluent in the draft permit corresponds to the temperature criterion for segment 0615, Angelina River/Sam Rayburn Reservoir. The proposed permit was drafted in accordance with ~~30 TAC Chapter 307~~, and the "Procedures to Implement the Texas Surface Water Quality Standards," January 2003 (Implementation Procedures). ~~30 TAC Chapter 307~~, states that surface waters cannot be made toxic to aquatic or terrestrial organisms. The limit is the segment ambient temperature of the receiving water (93 degrees F). As stated under 307.4(f) the numerical temperature criteria has not been established but the segment ambient temperature is applied based on Best Professional Judgment in order to maintain the

temperature of the surface waters (unnamed tributary; thence to Ellen Trout Lake; thence to Mill Creek; thence to Paper Mill Creek; thence to Angelina River/Sam Rayburn Reservoir in Segment No. 0615 of the Neches River Basin).

**Comment 4:**

Mr. Karczewski asserted that solvents and other chemicals used in maintaining cooling coils contain hazardous chemicals. Some of these may have long half-lives that will allow for accumulation to unsafe levels.

**Response 4:**

Appendix A, 40 C.F.R. Part 423 includes chemicals added for cooling tower maintenance. Except for chromium and zinc, these chemicals shall be limited in the discharge to "no detectable amount." If used, total chromium shall be limited to 0.2 mg/l maximum at any time and total zinc shall be limited to 1.0 mg/l maximum at any time. The total chromium or total zinc parameters shall be monitored weekly by grab sample. The use of other chemical additives is not authorized unless approval is obtained and limitations are established on a case-by-case basis in accordance with 40 C.F.R. § 122.62(a).

**Comment 5:**

Mr. Karczewski commented that some of the chemicals used along with the increased temperature are likely to result in the death of vegetations along the discharge route. The commenter stated that the 1,491 lbs of dissolved solids during each day of discharge will result in an excessive buildup of solids within the receiving waters and the impact of this will be imposed disproportionately on the SI Ltd tract. Under the proposed permit, over 272 tons per year of additional solids will be dumped on the SI Ltd tract. Mr. Karczewski added that the proposed permit as drafted authorizes the discharge of over 26 lbs per day or almost 9,500 lbs per year of grease to be discharged through the SI Ltd tract. This will be hazardous to human health and wild life and negatively impact the value and marketability of the SI Ltd tract.

**Response 5:**

The draft permit was written in accordance with 30 TAC § 307.4(b) (5). According to this section waste discharge shall not cause substantial and persistent changes from ambient conditions of turbidity or color and to protect the water quality of the receiving stream. Also, surface waters shall be maintained so that oil, grease, or related residue will not produce a visible film of oil or globules of grease on the surface or coat the banks or bottom of the watercourse; or cause toxicity to man, aquatic life, or terrestrial life in accordance with 30 TAC § 307.4(d).

The daily maximum limit for temperature is the segment criterion. The derivation of water quality-based limits and monitoring requirements for the protection of aquatic life for total phosphorus, total dissolved solids and total chlorides are based on Water Quality Standards Implementation Team recommendations. The total dissolved solids (TDS) limit of 1,491 lbs/day or 831 mg/L was calculated according to the Implementation Procedures using the TDS criterion for Segment No. 0615. As a comparison, the maximum allowable concentration of TDS in drinking water is 1,000 mg/l according to 30 TAC, Section 290.118(b). This concentration is not expected to lead to buildup of solids within the receiving waters or on the land downstream, as these solids are dissolved in the water.

The following daily average and daily maximum effluent limitations and monitoring requirements are established in the draft permit:

Outfall 001	Pollutant	Daily Average	Daily Maximum
	Flow (MGD)	(0.214)	(0.45)
	Temperature (degrees F)	N/A	(93)
	Free Available Chlorine	0.2 mg/l 0.03 lb/day	0.5 mg/l 0.07 lb/day
	Total Phosphorus	1.0 mg/l 1.79 lbs/day	2.1 mg/l 3.76 lbs/day
	Total Dissolved Solids	831 mg/l 1491 lbs/day	1753 mg/l 3145 lbs/day
	Total Chloride	Report	Report
	pH, standard units (SU)	(6.0 minimum)	(9.0 maximum)
Outfall 101	Flow (MGD)	(Report)	(Report)
	Total Suspended Solids	30 mg/l	100 mg/l
	Oil and Grease	15 mg/l	20 mg/l
	pH, standard units (SU)	(6.0 minimum)	(9.0 maximum)

The effluent limits in the draft permit will maintain and protect the existing instream uses. In accordance with 30 TAC § 307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Ellen Trout Lake, which has been identified as having high aquatic life uses. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

TCEQ practice for determining significant potential for degradation of water quality is to compare the reported analytical data against percentage of the calculated daily average water quality-based effluent limitation. Permit limitations are required when analytical data reported in the application exceeds 85% of the calculated daily average water quality-based effluent limitation. Monitoring and reporting is required when analytical data reported in the application exceeds 70% of the calculated daily average water quality-based effluent limitation. No analytical data was reported in the application because this is a new permit. Therefore, Other Requirement No. 13 retest requirements were placed in the draft permit for discharges via Outfall 001, requiring testing and possible of amendment by TCEQ after review of the test results.

**Comment 6:**

Mr. Karczewski stated that the discharge is into Segment 0615 of the Angelina/Neches River, a 303(d) listed stream segment.

**Response 6:**

The 2008 Clean Water Act Section 303(d) listing is specifically downstream of Paper Mill Creek and is for depressed levels of dissolved oxygen, impaired fish community, mercury in edible tissue, and bacteria. Impairment for mercury in tissue

and low dissolved oxygen is upstream of Paper Mill Creek. In addition, the lower 9 miles of Paper Mill Creek (unclassified water body) are impaired for elevated levels of bacteria. Information provided in the Application by the Applicant indicates that mercury is not present in the effluent discharged, and it is not expected to contribute to impairment of fish communities. The Applicant does not propose to discharge oxygen demanding constituents, therefore this permit action should not result in contribution of oxygen demanding constituents delivered to Segment No. 0615. Other Requirement No. 4 in the draft permit explicitly prohibits the discharge of domestic wastewater. Therefore, discharges from this facility are not expected to cause or contribute to the bacterial impairment in Segment No. 0615.

**Changes Made to the Draft Permit in Response to Comment**

Based upon comment and water quality data review recommendation by Standards Implementation Team, temperature effluent limitation in the draft permit has been updated:

Final effluent limitations are established in the draft permit as follows:

<u>Outfall Number</u>	<u>Pollutant</u>	<u>Daily Average</u>	<u>Daily Maximum</u>
001	Temperature (degrees F)	N/A	(93)

OTHER CHANGES MADE TO DRAFT PERMIT

Based on staff comment, the following change was made to the draft permit:

<u>Outfall Number</u>	<u>Pollutant</u>	<u>Daily Average</u>	<u>Daily Maximum</u>
001	Flow (MGD)	(0.214)	(0.45)

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive Director

Robert Martinez, Director  
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR  
OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on April 18, 2011 the "Executive Director's Response to Public Comment" for Permit No. WQ0004359000 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk.

*Robin Smith*

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